ber tappers had in fact been terminated by the defendant by (a) transferring the complainants to Sembrong Estate, Layang-Layang; or (b) giving alternative employment as general workers in the same estate; or (c) change of work as harvesters to another estate belonging to the same company, when all the rubber trees in Lambak Elaeis were felled'. She recognized the right of the employer as such to transfer employees but she found for a fact (as I have already observed when dealing with the second ground) that the complainants had good reason to reject the offer for transfer. Of the complainants, seven were women who obviously would have been hard put to it if they had had to work as harversters as they would then have had the arduous and risky job of climbing ladders to chop down the oil palm fruit. The question as to who the actual employer was could not have affected her finding of fact that the new employment was less favourable than the previous one. I therefore found no merit in this ground.

I must say I readily agreed with counsel for the complainants that the unilateral act of the defendant in converting the complainants from the status of permanent employees to that of daily-paid workers was clearly a case of subjecting the complainants to less favourable employment of a kind which constituted wilful breach by the defendant of a condition of the complainants' contract of service under s 13(2) of the Act entitling them per se to termination benefits.

In my view, the Penolong Pengarah Buroh addressed the real issue before her correctly having regard to equity and the substantial merits of the claim. The appeal was accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co; P Kuppusamy & Co.*

Reported by *Kevin Mathews*

Bank Bumiputra Malaysia Bhd v Henry Ginai Anak Langgie

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KG 300 OF 1987
HAIDAR J
26 AUGUST 1989

Agency — Power of attorney — Interpretation — Whether attorney had acted outside the scope and authority of his powers

The defendant was the registered proprietor of the land described as lot 211 block 11 Muara Tebas Land District situated at Air Terjon Tabuan Kuching, Sarawak ('the land'). On 18 March 1983, he granted a power of attorney to his brother John A Langgi ('the attorney') in respect of the land. The attorney, in purported exercise of his powers, charged the land to the plaintiff to obtain overdraft facilities of $50,000 and letter of credit/trust receipts for $30,000 for the use of one company named Tanah Sheema Enterprise ('the company') vide a memorandum of charge dated 1 March 1986. The plaintiff now seeks an order to sell by public auction the defendant's land.

Held, dismissing the summons:

(1) A power of attorney is construed strictly by the courts according to well-recognized rules. The powers of attorney are interpreted as giving only such authority as they confer expressly or by necessary implication.

(2) The attorney in purported exercise of his authority acted in excess of and outside the reasonable scope of his special powers by charging the land for his own personal benefit or for the use of the company and not for the benefit of the defendant. Unless the defendant expressly authorized it or adopted it by taking the benefit of it or otherwise, the plaintiff, as the third party, will be unable to make the defendant, as principal, liable.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-391 of 1989.]

Cases referred to

1 *Esdaile & Ors* v *La Nauze & Heyland* (1835) 160 ER 160 (refd)
2 *Jacobs* v *Morris* [1902] 1 Ch 816 (folld)

Legislation referred to

Sarawak Land Code (Cap 81) s 148(2)(c)

Clement Eddy for the plaintiff.
Ernest Chua for the defendant.

Cur Adv Vult

Haidar J: The plaintiff, by Originating Summons No KG 300/87 filed on 9 October 1987, seeks an order to sell by public auction the defendant's land described as lot 211 block 11 Muara Tebas Land District situate at Air Terjon, Tabuan, Kuching, Sarawak containing an area of 3925sq m, more or less, ('the land') to recover

(i) the sum of $54,832.44 due as at 24 February 1987 to the plaintiff by the defendant under a memorandum of charge no L 3019/1986 executed and registered at the Kuching Land Registry Office on 24 March 1986;

(ii) interest accruing thereon at the rate of 11.75% pa on monthly rests from 25 February 1987 till date of final payment or such other rate of interest as the plaintiff may from time to time prescribe;
(iii) the sum of $1,700.00 as costs on a solicitor and client basis;
(iv) the costs and expenses of and incidental to the application and the sale.

The defendant, as the registered proprietor of the land granted a power of attorney on 18 March 1983 to his brother, John A Langgi (see exh 'HGL-1' to encl 10) in respect of the land. John A Langgi, in purported exercise of the powers under exh 'HGL-1', charged the land to the plaintiff to obtain overdraft facilities of $50,000 and letter of credit/trust receipts for $30,000 for the use of one company named Taman Sheema Enterprise ('the company') vide memorandum of charge dated 4 March 1986 (exh 'A' to affidavit of Abdul Rahman Haji Ali in encl 2).

The issue before the court is whether John A Langgi has acted outside the scope and authority of his powers as embodied in 'HGL-1' especially cl 1(4), (5), (6), (7) and (8) thereof by charging the land to the plaintiff.

The defendant in para 5 of his supplementary affidavit in opposition (encl 16) said that he had no part to play in the company. This fact is not challenged by the plaintiff and I therefore take it that such fact is not disputed. According to exh 'HGL-2', the purpose of the facilities granted to the company as per para 2 thereof is

(a) Overdraft — As additional working capital.
(b) Trust receipt — To finance import of beer from Singapore and Philippines, animal food settlement, clothings, garments and building materials from Singapore, India and Philippines.
(c) Letter of credit — To convert sight letter of credit.

A power of attorney is construed strictly by the courts according to well-recognized rules. The powers of attorney are interpreted as giving only such authority as they confer expressly or by necessary implication. *Bowstead on Agency* (13th Ed) at p 65 lays down the following as being the most important rules when construing a power of attorney:

(a) The operative part of a deed is controlled by the recitals where there is ambiguity.
(b) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.
(c) General words do not confer general powers, but are limited to the purpose for which the authority is given, and which are construed as enlarging the special powers only when necessary for that purpose.
(d) The deed must be construed so as to include all incidental powers necessary for its effective execution.

Going by the power of attorney (exh 'HGL-1'), it is clear that there are no recitals in 'HGL-1'. Though there are no recitals in 'HGL-1', in my view, we have to examine whether there is ambiguity in the power of attorney. It would appear that by cl 1(4), (5), (6), (7), (8), (9) and (10) of 'HGL-1', the purpose and true intention of the defendant is to develop the land for residential houses and/or commercial houses. To this end, John A Langgi is empowered to take action for the conversion of the land from agriculture to building and to do all such acts as are necessary for carrying into effect the intention of the defendant. It may be true that cl 1(3) would appear to give general power to John A Langgi to 'mortgage charge or raise loan up to M$200,000 only' with the land as security but such general power is restricted to what is necessary for the proper performance of the particular acts. (See *Esdaile & Ors* v *La Nauze & Heyland.*[1])

The general power is to be construed as enlarging the special power only when necessary for that purpose. In this case, no doubt John A Langgi may appear to have been given the general power to charge the land but such power is only enlarged to the extent that such charge must be for the purpose of obtaining loan to develop the land. Therefore, John A Langgi in purported exercise of his authority acts in excess of and outside the reasonable scope of his special powers by charging the land for his own personal benefit or for the use of Taman Sheema Enterprise and not for the benefit of the defendant. Unless the defendant expressly authorized it or adopted it by taking benefit of it or otherwise, the plaintiff, as the third party, will be unable to make the defendant, as the principal, liable. (See *Jacobs* v *Morris.*[2]) There is no evidence that the defendant has anything to do with Taman Sheema Enterprise and neither has he gained any benefit thereof.

Mr Clement Eddy argued that cll 3 and 4 in the power of attorney would appear to cover the action of John A Langgi in this case. In my view, cll 3 and 4 will have to be read subject to the intention and objective of the defendant in the power of attorney. In other words, they are confined to the exercise of the powers in respect of the development of the land and to be construed so as to include all incidental powers necessary for its effective execution. In my view, the plaintiff need not inquire into the powers of attorney given to John A Langgi by the defendant in so far as the powers are exercised for the development of the land but not otherwise.

In the circumstances I am of the opinion that the action of John A Langgi does not bind the defendant as the principal and it is therefore not just for the court to exercise its powers under s 148(2)(c) of the Land Code

(Cap 81) to order the sale of the land and I would dismiss this originating summons with costs to the defendant.

Summons dismissed.

Solicitors: *Sulong Matjeraie & Co; Ernest Chua & Co.*

Reported by *Kevin Mathews*

Bank Bumiputra Malaysia Bhd v Syarikat Gunong Tujoh Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO KG 638 OF 1986
HAIDAR J
14 JULY 1989

Civil Procedure — Intention to proceed — Failure to give one month's notice of — Whether nullity of proceedings or mere irregularity — Discretion of court to set aside proceedings — Rules of the High Court 1980, O 2 r 1(1) & O 3 r 6

Civil Procedure — Order 18 application — Delay in taking out application — Whether delay fatal — Whether oral evidence by counsel may be given to explain delay

The first defendant appealed against the senior assistant registrar's decision dismissing the preliminary objection in respect of an O 18 application by the plaintiff. The first defendant contended that (a) the plaintiff did not comply with O 3 r 6 in failing to give the first defendant one month's notice of its intention to proceed with the application; and (b) the inordinate delay in filing the application was fatal in this case.

Held, dismissing the defendant's appeal:

(1) Order 3 r 6 applies to interlocutory proceedings before final judgment and an O 18 application is an interlocutory proceeding; as such the plaintiff's application was caught by O 3 r 6 and hence one month's notice must be given to the first defendant. However, O 2 r 1(1) provides that the failure to comply with the rules was an irregularity and should not nullify the proceedings. It was therefore curable on terms. Nevertheless, the court retains the discretion to set aside either wholly or in part the proceedings.

(2) In exercising its discretion to correct irregularities, the court will consider whether the opposite party had suffered prejudice as a result of non-compliance. The plaintiff's summons-in-chambers was served on the first defendant on 23 January 1989, which was 44 days before the hearing of the plaintiff's application on 7 March 1989. Therefore, the first defendant had ample notice to prepare itself and there is no reason why the first defendant was in any way prejudiced as a result of the plaintiff's failure to give the one month's notice.

(3) There was delay in the O 18 application but such a delay is not fatal and may be made even after pleadings are closed. The delay was explained orally by counsel for the plaintiff and as the senior assistant registrar was prepared to accept the explanation to account for the delay, there was no good reason to question his acceptance of the explanation. Although ideally such explanation should be in the form of affidavit evidence, it is not wrong for counsel who has personal knowledge of the grounds for the delay to do so orally. As such, the senior assistant registrar has exercised his judicial discretion correctly and there is no reason to disturb it.

Cases referred to

1 *May* v *Wooding* (1815) 3 M & S 500; 105 ER 698 (refd)
2 *Bank Bumiputra Malaysia Bhd & Anor* v *Lorrain Esme Osman & Ors* [1987] 2 MLJ 633 (refd)
3 *Ong Lean Sim & Anor* v *Tio Kah Hin & Ors* [1985] 1 MLJ 270 (refd)
4 *Tucker* v *Collinson* (1886) 34 WR 354 (refd)
5 *Huo Heng Oil (EM) Sdn Bhd* v *Tang Tiew Yong* [1987] 1 MLJ 139 (refd)

Legislation referred to

Rules of the High Court 1980 O 2 r 1(1), O 3 r 6, O 56 r 1(1)

Salang Hon (Mrs) for the plaintiff.
Authur Lee for the defendant.

Cur Adv Vult

Haidar J: This is an appeal by the first defendant under O 56 r 1(1) of the Rules of the High Court 1980 against the decision of the senior assistant registrar on 8 March 1989 dismissing the first defendant's preliminary objection in respect of an O 18 application by the plaintiff. The first defendant advanced two grounds, namely:

(1) the plaintiff's non-compliance with O 3 r 6 in failing to give to the first defendant one month's notice of its intention to proceed with an application under O 18;
(2) inordinate delay in filing the application under O 18.

Ground (1)

Order 3 r 6 reads:

> Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed. A summons on which no order was made is not a proceeding for the purpose of this rule.

According to *Mallal's Supreme Court Practice* (2nd Ed) at p 16, the word 'proceeding' indicates a step 'towards' judgment and the rule, therefore, applies only when judgment has not been entered up; in other words it refers to an interlocutory proceeding before final judgment. An O 18 application, in my view, is an interlocutory proceeding and as such the plaintiff's application is caught by O 3 r 6 and hence one month's notice must be given to the first defendant. It is not disputed that no one month's notice was given by the plaintiff. What then is the effect of the non-compliance of O 3 r 6 by the plaintiff in this case? Mr Arthur Lee, for the first defendant, strenuously argued that the word 'must' used therein should be construed as 'shall' thereby having mandatory effect and thus the plaintiff's application should be dismissed. But O 2 r 1(1) provides:

> Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any